

S. Ct. Case No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEARSON DENTAL SUPPLIES, INC. and PEARSON DENTAL SUPPLY CO.
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

LUIS TURCIOS,
Real Party in Interest.

Petition for Review of a Decision of the Court of Appeal, Second Appellate
District, Division Four, Case No. B206740, Granting a Writ of Mandate to the
Superior Court for the County of Los Angeles, Case No. BC359605, Dept. 31,
Honorable Alan S. Rosenfield, Judge

PETITION FOR REVIEW

N. Nick Ebrahimian, Esq., State Bar No. 219270
nebrahimian@lelawfirm.com
Jordan D. Bello, Esq., State Bar No. 243190
jbello@lelawfirm.com
LAVI & EBRAHIMIAN, LLP
8383 Wilshire Blvd., Suite 840
Beverly Hills, California 90211
Telephone Number: (323) 653-0086
Facsimile Number: (323) 653-0081

Attorneys for Plaintiff, Real Party in Interest, and Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ISSUES PRESENTED FOR REVIEW	1
WHY REVIEW SHOULD BE GRANTED	2
LEGAL DISCUSSION	6
I. Review Should Be Granted to Settle an Unresolved Question of Widespread Importance Concerning the Standard of Judicial Review Available to Trial Courts to Ensure Mandatory Employment Arbitration is an Adequate Forum to Vindicate Employees' FEHA Rights.....	6
II. Review Should Be Granted to Clarify the Disputed Issue of Whether a Mandatory Employment Arbitration Agreement Can Restrict an Employee's Right to Seek An Administrative Remedy From the DFEH for Violations of the FEHA	11
CONCLUSION	12
CERTIFICATE OF WORD COUNT	13
COURT OF APPEAL DECISION PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.504(b)(4).....	14
PROOF OF SERVICE	iii

TABLE OF AUTHORITIES

Page

United States Supreme Court Cases

<i>Gilmer v. Interstate/Johnson Lane Corp.</i> (1991) 500 U.S. 20	8, 11
<i>Mitsubishi Motors v. Soler Chrysler-Plymouth</i> (1985) 473 U.S. 614, 628	10

Cases

<i>Armendariz v. Foundation Health Psychcare Services, Inc.</i> (2000) 24 Cal.4th 83	passim
<i>Cable Connection, Inc. v. DirectTV, Inc.</i> (2008) 44 Cal.4th 1334	4
<i>Cole v. Burns Intern. Security Services</i> (D.C. Cir. 1997) 105 F.3d 1465	7, 8, 10
<i>Moncharsch v. Heily & Blase</i> (1992) 3 Cal.4th 1	passim

Statutes

Code of Civil Procedure

§ 1280 et seq.....	2
§ 1281.12.....	4
§ 1286.2.....	6
§1286.6.....	6

Government Code

§ 12900 et seq.....	2
---------------------	---

United States Code

42 U.S.C. § 2000e et seq.....	7
-------------------------------	---

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEARSON DENTAL SUPPLIES, INC. and PEARSON DENTAL SUPPLY CO.
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

LUIS TURCIOS,
Real Party in Interest.

Petition for Review of a Decision of the Court of Appeal, Second Appellate
District, Division Four, Case No. B206740, Granting a Writ of Mandate to the
Superior Court for the County of Los Angeles, Case No. BC359605, Dept. 31,
Honorable Alan S. Rosenfield, Judge

PETITION FOR REVIEW

ISSUES PRESENTED FOR REVIEW

1. What standard of judicial review is permitted to a trial court to ensure that an employee's anti-discrimination claim brought under the California Fair Employment and Housing Act is adequately protected when arbitrated pursuant to a mandatory employment arbitration agreement?

2. Can an arbitration agreement imposed by an employer on an employee as a mandatory term of employment restrict an employee from seeking

administrative remedies for violations of the Fair Employment and Housing Act from the Department of Fair Employment and Housing?

WHY REVIEW SHOULD BE GRANTED

Eight years have passed since this Court held in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), that mandatory employment arbitration agreements are lawful and enforceable if they provide for a neutral arbitrator, allow for more than minimal discovery, direct the arbitrator to issue a written award with findings and conclusions allowing judicial review, permit the recovery of all types of relief and remedies that are available in a civil action, and do not require the employee to bear unreasonable arbitration costs. As mandatory employment arbitration agreements have proliferated, increasing economic crises require employers to make important economic decisions including selection of employees to let go to secure the future of the business, whether based on valid or invalid bases. Accordingly, this case presents a question of fundamental importance to millions of California employees forced to choose between mandatory employment arbitration agreements or finding employment elsewhere and to countless other workers who have already signed a mandatory employment agreement requiring them to arbitrate their claims pursuant to the Fair Employment and Housing Act (FEHA) (Gov. Code § 12900 et seq.)—to what extent may a trial court judicially review an arbitrator's decision to ensure arbitration pursuant to a mandatory employment arbitration agreement adequately protects an employee's anti-discrimination rights pursuant to the FEHA.

In *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*), 33 the California Supreme Court reaffirmed the general rule, also known as the

California rule, that trial and appellate courts may only review an arbitrator's decision on the bases set forth by the California Arbitration Act (CAA) (Code Civ. Proc. § 1280 et seq.), even if the arbitrator award is erroneous on its face and results in substantial injustice.

In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 106-107 (*Armendariz*), this Court tempered the California rule when applied to arbitration of anti-discrimination claims under the FEHA pursuant to a mandatory employment arbitration agreement. This Court held that a trial court is permitted some judicial review of an arbitration award to ensure that an employee's FEHA rights are adequately vindicated. (*Armendariz, supra*, 24 Cal.4th 83, 106-107.) This Court refrained from articulating what judicial review is sufficient to ensure an employee's FEHA rights are adequately protected because *Armendariz* did not involve review of a petition to confirm an arbitrator's award. (*Id.* at p. 107.)

This case is an ideal vehicle to clarify the scope of judicial review which was not directly before the Court in *Armendariz*. This case involves a review of the trial court's grant of a petition to vacate the arbitrator's award and denial of a petition to confirm. After the defendant's delayed demand for arbitration, the plaintiff arbitrated his FEHA claim pursuant to a mandatory employment arbitration agreement which expressly provided it was to apply the CAA. In arbitration, the arbitrator granted defendant's motion for summary judgment holding that plaintiff's FEHA claim was barred because he failed to demand

arbitration within the tolling period provided by the CAA¹. When presented with conflicting petitions to confirm or vacate the arbitrator's decision, the trial court relied on *Armendariz* and vacated the arbitrator's decision. The court found that the arbitrator had misapplied the CAA's tolling provision and the defendant's conduct prior to arbitration estopped it from challenging the validity of the arbitration forum for plaintiff's FEHA claims. The Court of Appeal acknowledged that the arbitrator committed an error of law on the face of the decision which resulted in substantial injustice, the improper dismissal of plaintiff's FEHA claims. The Court of Appeal reversed the trial court. The Court of Appeal held that the California rule prevented the trial court from reviewing the arbitrator's decision despite his error of law causing substantial injustice. The Court of Appeal also denied plaintiff's petition for rehearing based on this issue.

The present case is especially ripe as this Court determined last month in *Cable Connection, Inc. v. DirectTV, Inc.* (2008) 44 Cal.4th 1334, 1355-1356, (*Cable Connection*) that contracting parties can take themselves outside of the California rule by clearly agreeing that the dispute is to be determined according to the rule of law and that the parties intend that the award is reviewable for legal error. Contrary to the circumstances in *Cable Connection*, employer-mandated arbitration agreements addressed in *Armendariz* are drafted exclusively by the employer and forced on the employee. The employee cannot alter the terms of the agreement and is left to accept employment pursuant to the arbitration agreement on a "take it or leave it basis." (*Armendariz, supra*, 24 Cal.4th 83, 115.)

¹ Code of Civil Procedure section 1281.12 provides in relevant part: "If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy. . ."

This Court should grant review to finally articulate what judicial review is available to a trial and appellate court to ensure that mandatory employment arbitration adequately protects employees' anti-discrimination rights under the FEHA. Despite eight years passing since *Armendariz*' statement that judicial review may be necessary to protect employees' FEHA rights in an employer-imposed arbitration, no court has clarified what judicial review is available to ensure adequate protection of an employee's FEHA rights. When the issue was squarely presented in this case, the Court of Appeal continued to apply the California rule even when the arbitrator's error of law on the face of the decision resulted in substantial injustice and failed to adequately vindicate the plaintiff's FEHA rights.

In addition, this petition raises a secondary issue also addressed by this Court in *Armendariz*—whether a mandatory employment arbitration agreement can restrict an employee from pursuing an administrative remedy for a violation of FEHA from the Department of Fair Employment and Housing (DFEH), the administrative agency charged with prosecuting complaints made under the FEHA. In *Armendariz*, this Court stated in a footnote that its decision did not imply arbitration agreements could limit an employee's resort to the DFEH. (*Armendariz, supra*, 24 Cal.4th 83, 99, fn.6) In the present case, the Court of Appeal states in its published decision that a mandatory employment arbitration agreement can prevent an employee from seeking an administrative remedy before the DFEH. As the Court of Appeal applied that finding in its published decision, it creates contradictory authority to this court's statement in *Armendariz*. In addition, it may dissuade employees from seeking an administrative remedy which is available to them regardless of the existence of a mandatory employment arbitration agreement.

Review should be granted to provide guidance to trial courts to ensure consistent application of these principles and clarify important points of law. A clear standard of review will ensure the fundamental state policy prohibiting discrimination is not impaired by employers increased use of employer-drafted arbitration agreements imposed on employees as a term of employment.

LEGAL DISCUSSION

I.

Review Should Be Granted to Settle an Unresolved Question of Widespread Importance Concerning the Standard of Judicial Review Available to Trial Courts to Ensure Mandatory Employment Arbitration is an Adequate Forum to Vindicate Employees' FEHA Rights.

In *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33 this Supreme Court reaffirmed the California rule in holding an arbitrator's decision cannot be reviewed for error of law on its face even if causing substantial injustice. This Court stated that a trial court could only review the decision on the bases set forth by the CAA, specifically Code of Civil Procedure sections 1286.2, 1286.6. (*Id.* at pp. 27-28.) This Court relied heavily on the premise that the parties' voluntarily agreed to submit their disputes to binding arbitration in reaffirming the California rule. (*Id.* at pp. 8-10.) "By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain." (*Id.* at p. 10.) This Court did note that limited and exceptional circumstances may justify judicial review when "granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights." (*Id.* at p. 32.)

In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 106-107 (*Armendariz*), this Court tempered the California rule when applied to arbitration of anti-discrimination claims under the FEHA pursuant to a

mandatory employment arbitration agreement. In *Armendariz*, this Court considered whether a mandatory arbitration agreement was enforceable against employees' claims based on FEHA. The employees' argued that the California rule made the vindication of FEHA rights in arbitration illusory. (*Id.* at p. 106.) To address this concern, this Court held that a trial court is permitted some judicial review to ensure arbitration is an adequate forum to vindicate an employee's FEHA rights. (*Id.* at pp. 106-107.) To that end this court held that one of the minimum requirements of mandatory employment arbitration agreement was that the arbitrator must issue a written decision to permit the trial court judicial review "when 'granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights.'" (*Id.* at p. 106, quoting *Moncharsh, supra*, 3 Cal.4th 1, 32.)

This Court based its tempering of the California rule on the recognition that the FEHA sets forth unwaivable statutory rights supporting the fundamental public interest in a workplace free from the insidious influence of discrimination. (*Armendariz, supra*, 24 Cal.4th 83, 100-101.) This Court also recognized that in the case of employer-drafted arbitration agreement imposed on an employee; economic concerns put an employee at a distinct bargaining disadvantage. The employee is faced with the choice of accepting the arbitration agreement according to the employer's terms or facing unemployment. This greatly reduces the "voluntary" nature in which the party enters the agreement. (*Id.* at pp. 114-115 ["Moreover, in the case of [mandatory employment] arbitration contracts, the economic pressure asserted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement."].)

This Court refrained from articulating the precise standard of judicial review available because the *Armendariz* did not involve review of a decision to confirm or vacate an arbitration award. (*Armendariz, supra*, 24 Cal.4th 83, 107 ["the employees' claim that they are unable to vindicate their FEHA rights because of inadequate judicial review of an arbitration award is premature."].) As this case presents the issue directly before the Court and involves an undisputed error of law resulting in substantial injustice, the Court should clarify the standard it could not address in *Armendariz*.

This Court has guidance to determine the scope of judicial review available to the trial court. In *Armendariz*, this Court borrowed the minimum requirements for employer-mandated arbitration agreements as applied to anti-discrimination statutes from an analogous federal decision, *Cole v. Burns Intern. Security Services* (D.C. Cir. 1997) 105 F.3d 1465 (*Cole*), which had formulated the requirements in the context of rights under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). The *Cole* court also considered the scope of judicial review available for employer-mandated arbitration of statutory claims.

The *Cole* court stated that "[t]here is no doubt that the scope of review of arbitration in cases involving mandatory arbitration of statutory claims is *at least* as great as the judicial review available in the context of collective bargaining"—where arbitral awards may be set aside if they are contrary to a well defined and explicit public set forth be laws and legal precedents. (*Cole, supra*, 105 F.3d 1465, 1486). The *Cole* court added that, under these circumstances, meaningful judicial review should also include the application of a "manifest disregard of the law" standard of judicial review which "ensure[s] that arbitrators have properly interpreted and applied statutory law." (*Id.* at p. 1487 [applying dictates from *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26, 32 (*Gilmer*) stating a party merely submits his statutory claims to an arbitral forum which

requires sufficient judicial review to ensure the arbitrator complies with the statutes at issue].)

As to the concern that enhanced judicial review, including review for manifest disregard of law, would undermine the benefits of the arbitration system, the *Cole* court stated:

The value and finality of an employer's arbitration system will not be undermined by focused review of arbitral legal determinations. Most employment discrimination claims are entirely factual in nature and involve well-settled legal principles. . . . As a result, in the vast majority of cases, judicial review of legal determinations to ensure compliance with public law should have no adverse impact on the arbitration process. Nonetheless, there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct.

(*Cole, supra*, 105 F.3d 1465, 1487.)

As phrased in slightly different terms by Justice Kennard in his dissent in *Moncharsh*,

Mistakes commonly occur in the course of dispute resolution proceedings without producing substantial injustice. . . . Parties who agree to resolve their disputes by arbitration should not and do not expect busy trial courts to comb the records of arbitration proceedings to determine whether any error has occurred and, if so, the effect of the error. But they no doubt do expect, and ought to be able to expect, that if the award on its face is erroneous and results in substantial injustice, a court asked to confirm the award will not turn a blind eye to the consequences of its action, but will instead take the only course consistent with its fundamental mandate, and will vacate the award.

(*Moncharsh, supra*, 3 Cal.4th 1, 35.)

Pursuant to this Court's reliance in *Armendariz* on *Cole* to determine the minimum standards required to create an enforceable mandatory arbitration agreement, it is also appropriate for this Court to apply the scope of judicial review available in *Cole*.

The Court of Appeal's approach in this case permits an error of law on the face of the arbitrator's decision to result in the substantial injustice of completely barring an employee's FEHA claims. Refusing to review the arbitrator's decision for clear errors of law which result in an improper dismissal of plaintiff's claims truly "makes the vindication of FEHA rights in arbitration illusory." (*Armendariz, supra*, 24 Cal.4th 83, 106.)

This Court should grant review to clarify the standard of judicial review available to trial and appellate courts in the specific context addressed by *Armendariz*—when reviewing an arbitrator's award governing FEHA claims pursuant to an employer-drafted arbitration agreement imposed on an employee as a term of employment. This clarification will protect employees' statutory rights while ensuring that the employer still enjoys the benefits of arbitration. As this Court stated in *Armendariz*: "The United States Supreme Court's dictum that a party, in agreeing to arbitrate a statutory claim, 'does not forgo the substantive rights afforded by the statute [but] only submits to their resolution in an arbitral . . . forum' [citation] is as much prescriptive as it is descriptive. That is, it sets a standard by which arbitration agreements and practices are to be measured, and disallows forms of arbitration that in fact compel claimants to forfeit certain substantive statutory rights." (*Armendariz, supra*, 24 Cal.4th 83, 100-101 [quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628.]

///

///

II.

Review Should Be Granted to Clarify the Disputed Issue of Whether a Mandatory Employment Arbitration Agreement Can Restrict an Employee's Right to Seek An Administrative Remedy From the DFEH for Violations of the FEHA.

In *Armendariz*, this Court stated: "Nothing in this opinion, however, should be interpreted as implying that an arbitration agreement can restrict an employee's resort to the Department of Fair Employment and Housing. ..." (*Armendariz, supra*, 24 Cal.4th 83, 99 n.6, citing to *Gilmer, supra*, 500 U.S. 20, 28.)

In the present case, the Court of Appeal states in its published decision an employer can prohibit an employee from seeking an administrative remedy before the DFEH as term of a mandatory employment arbitration agreement. The Court of Appeal considered this misapplication of law in determining that an arbitration agreement's one year time limitations provided adequate time for plaintiff to vindicate his FEHA claim.

As the Court of Appeal applied that finding in its published decision, it creates contradictory authority to this court's statement in *Armendariz*. In addition, it sets forth clear language in a published decision which may deter employees from seeking an administrative remedy available to them regardless of the existence of a mandatory employment arbitration agreement. Review should be granted to ensure uniformity of decision on this specific point of law. Absent further clarification, the Court of Appeal's published decision may prevent employees from seeking administrative relief to which they have a clear right.

///

///

///

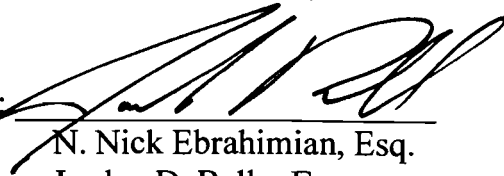
CONCLUSION

The *Armendariz* opinion settled many issues regarding the minimum requirements to create an enforceable mandatory employment arbitration agreement which likely contributed to the use of these agreements. However, the *Armendariz* opinion did not articulate the standard of judicial review available to the courts *after* the arbitration to ensure it was an adequate forum to protect an employee's FEHA rights. This case presents a petition to confirm the arbitration award which this Court expressly noted was not before it in *Armendariz*. Without this Court's guidance, employees will assume the risk that courts will rely on the California rule and refuse to overturn even those obvious arbitrators' errors which cause substantial injustice to employees' FEHA claims. A statement by this Court clarifying this issue, will mitigate these risks and ensure that the increased use of mandatory employment arbitration agreements will not weaken the fundamental public policy against workplace discrimination set forth by the FEHA.

Dated: September 30, 2008

Respectfully submitted
LAVI & EBRAHIMIAN, LLP

By:



N. Nick Ebrahimian, Esq.

Jordan D. Bello, Esq.

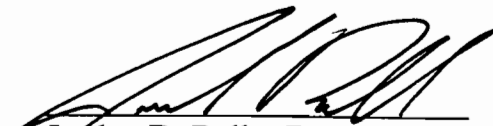
Attorneys for Real Party in Interest LUIS
TURCIOS

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1))

Pursuant to California Rules of Court, rule 8.504(d)(1), the text of this brief consists of 3,042 words as counted by the Microsoft Word 2003 word-processing program used to generate this brief.

Dated: September 30, 2008



Jordan D. Bello, Esq.

**COURT OF APPEAL DECISION PURSUANT TO CALIFORNIA RULES
OF COURT, RULE 8.504(b)(4)**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

PEARSON DENTAL SUPPLIES, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

LUIS TURCIOS,

Real Party in Interest.

B206740

(Los Angeles County
Super. Ct. No. BC359605)

ORIGINAL PROCEEDINGS in mandate. Alan S. Rosenfield, Judge.

Petition granted.

Law Offices of Russell F. Behjatnia and Russell F. Behjatnia for Petitioner.

No appearance for Respondent.

Lavi & Ebrahimian, N. Nick Ebrahimian and Jordan D. Bello for Real Party
in Interest.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part 2 of the Discussion.

INTRODUCTION

Plaintiff Luis Turcios sued his former employer, defendant Pearson Dental Supplies, Inc., for age discrimination under the California Fair Employment and Housing Act (FEHA), among other claims. His employment agreement with defendant contained a mandatory arbitration clause for employment-related claims, and provided that any such claim is waived, unless submitted to arbitration within one year from the date the dispute arose or from the date plaintiff first became aware of facts giving rise to the dispute. Applying this provision in court-ordered arbitration, the arbitrator found that plaintiff had failed to timely submit his FEHA claim to arbitration. Therefore, the arbitrator granted summary judgment for defendant. The trial court, however, vacated the arbitration award on the ground, *inter alia*, that the one-year limitation period impermissibly infringed on plaintiff's unwaivable statutory rights under the FEHA, and that therefore the arbitrator had exceeded his power in enforcing the one-year limit. (Code Civ. Proc., § 1286.2, subd. (a)(4).)¹ Defendant petitioned for a writ of mandate to compel the trial court to confirm the award, and we issued an order to show cause.

In the published portion of this opinion, we hold that on the facts of this case, the one-year limitation period did not unreasonably restrict plaintiff's ability to vindicate his rights under the FEHA. In the unpublished portion, we reject the other grounds on which plaintiff relies to uphold the court's ruling. Therefore, we grant the petition and direct the trial court to set aside its order vacating the arbitration award and to enter an order granting the petition to confirm the award.

¹ All undesignated section references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Employment Relationship*

In February 1999, defendant hired plaintiff, who was then 59 years old, as a maintenance worker. In January and February 2001, the parties signed a “Dispute Resolution Agreement” (DRA). The pre-printed form provides, in relevant part, that “[t]o avoid the inconvenience, cost and risk that accompany formal administrative or judicial proceedings, [the parties] agree that [any] dispute arising in any way out of, or in way related to, Employee’s . . . employment with [defendant] and/or termination of employment shall be resolved through arbitration conducted by a mutually agreed upon arbitrator pursuant to the California Arbitration Act, California Code of Civil Procedure § 1280, *et seq.*”

The DRA contains the following time limitation: “[Defendant] and the Employee further agree that any dispute with any party which arises from employee’s employment with [defendant] or termination of employment with [defendant] must be submitted to binding arbitration within one year from the date the dispute arose or the Employee or [defendant] first became aware of facts giving rise to the dispute. If any employment-related dispute which may arise is not submitted to binding arbitration within one year from the date the dispute arose or the Employee or [defendant] first became aware of facts giving rise to the dispute, [defendant] and the Employee agree that the claim shall be void and considered waived to the fullest extent allowed by law.” These arbitration provisions are also found in defendant’s Employee Handbook which plaintiff, through a signed writing, acknowledged he had received in 2001.

On January 31, 2006, defendant fired plaintiff.

2. The Lawsuit

Following his termination, plaintiff immediately retained counsel, the Homampour Law Firm, PLC. On February 9, 2006, that firm requested defendant to provide it with a complete copy of plaintiff's personnel file. Two weeks later, defendant sent the firm a copy of the file, including a copy of the signed DRA.

Sometime thereafter, plaintiff retained new counsel, Lavi & Ebrahimian, LLP. On April 5, 2006, that firm, which has continued to represent plaintiff up to and including this writ proceeding, filed an age discrimination complaint on plaintiff's behalf with the Department of Fair Employment and Housing (DFEH). (Plaintiff was 67 years old when defendant fired him.) The complaint stated that plaintiff wished "to pursue this matter in court" and therefore "request[ed]" that DFEH "provide a right-to-sue notice." DFEH issued the right-to-sue letter on April 14, 2006.

On October 2, 2006, plaintiff filed suit against defendant. The complaint alleged three causes of action: age discrimination in violation of FEHA; wrongful discharge in violation of public policy; and breach of an implied-in-fact contract not to terminate without good cause.

For the next four months, the parties engaged in pleading litigation and discovery. As part of the discovery process, plaintiff asked defendant in November 2006 if there were any written agreements, rules or procedures applicable to plaintiff's employment relationship with defendant. Defendant's response, given in January 2007, made no reference to the DRA. Further, defendant's answer to the complaint asserted 31 affirmative defenses, but made no mention of the DRA.

At the February 20, 2007 case management conference, the parties informed the court that they had agreed to participate in private mediation. Defense counsel stated that it wished to "advise the court regarding an issue that [he had] come

across in the [plaintiff's] personnel record. . . . There's a binding arbitration agreement between the company and all of its employees, it would be something that [he] would have to explore." He explained that he had told plaintiff's counsel about this issue "just this morning." The court declined to take up the issue of arbitration,² and, instead, with the parties' agreement, set the dates for future appearances based upon the assumption the matter was set for trial.

Two days later (February 22), defendant sent a letter to plaintiff formally demanding that the case be submitted to binding arbitration pursuant to the DRA. Plaintiff declined to do so.

On March 2, defendant sent another letter to plaintiff. This one demanded that plaintiff dismiss his lawsuit with prejudice because he had failed to request arbitration within a year of his termination. Plaintiff refused.

3. The Petition to Compel Arbitration

On March 13, defendant filed a petition to compel arbitration. Defendant attached a copy of the DRA and its February 22 letter to plaintiff. The petition described the controversy as pertaining to "in particular, the termination of [plaintiff's] employment with [defendant]." Defendant's petition did not mention the one-year limitation period or contend that it had expired, and the petition did not include a copy of defendant's March 2 letter to plaintiff which had made that argument.

Plaintiff's opposition to the motion to compel primarily urged that defendant had waived its right to arbitration by participating in the litigation. Plaintiff also

² The trial court commented: "We're not going to take it up now. All I can tell you folks is if somebody thinks they have a valid agreement [to arbitrate], they are wasting time the longer they wait to bring a petition. I don't understand."

urged he had been prejudiced because of the time and money he had spent in prosecuting the lawsuit up to that point. Plaintiff made no mention of the one-year limitation period in the DRA; made no claim that the DRA was procedurally or substantively unconscionable; and made no attempt to explain why he had not first submitted his claim to arbitration.

On April 12, the trial court, following a reported hearing, granted the petition to compel arbitration.³ Its order states, in relevant part, that “this matter and controversy is submitted to arbitration pursuant to the terms and conditions set forth in the [DRA].”

On May 1, plaintiff filed a petition for extraordinary relief in this court seeking to overturn the trial court’s order compelling arbitration. The petition reiterated the argument that defendant had waived the right to compel arbitration by participating in the lawsuit. On May 31, we summarily denied the petition.

4. *Arbitration Proceedings*

On July 24, defendant moved for summary judgment in the arbitration proceeding. For the first time other than the March 2 letter, defendant argued that plaintiff “did not timely demand nor submit to binding arbitration the claims which he now seeks to resolve . . . in this Arbitration proceeding by his failure to timely submit the matters to arbitration as required pursuant to the [DRA].” The motion contended that this “‘statute of limitations’ defense . . . [was] properly brought in

³ During the hearing, the trial court commented: “[T]here is no real explanation offered to us for this delay. . . . [¶] But if you read the case law, it’s quite clear that if a party signs an arbitration agreement, which [plaintiff] did, they have made a contractual promise to arbitrate. I don’t know why [plaintiff] chose not to comply with that. [He] made a choice; he brought a lawsuit instead of seeking to arbitrate and under the case law, there has to be a lot more than what is before me for me to find a waiver [by defendant of the right to compel arbitration].”

this arbitration before the arbitrator” and that “[t]he timeliness issues . . . are matters that can only be resolved in ‘binding arbitration.’”

Plaintiff’s opposition to summary judgment did not explain why he had never requested arbitration. Instead, his pleading raised three grounds to defeat defendant’s motion: (1) plaintiff’s right to arbitrate was tolled during the pendency of the civil action, thereby rendering the arbitration timely;⁴ (2) the one-year limitation period in the DRA was substantively unconscionable and thus unenforceable; and (3) defendant’s request for arbitration was untimely. Plaintiff stated that “[a]lthough the issue of whether a party waived its right to compel arbitration . . . is determined by the [trial] court, whether a demand for arbitration is timely under the terms of the agreement is an issue to be decided by the arbitrator. (See *Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc.* (1996) 41 Cal.App.4th 1167, 1177-1178.)”

Defendant’s reply to plaintiff’s opposition stated that it had not sought arbitration to litigate the merits of plaintiff’s claims but, instead, had “sought arbitration to determine the procedural issue of timeliness.”

By letter, the arbitrator informed the parties of his intent to grant defendant’s motion for summary judgment. He explained: “The employee[’s] failure to submit his claims and disputes to binding arbitration within the one year period as required by the Dispute Resolution Agreement or within the tolling period

⁴ Plaintiff relied upon section 1281.12 which provides: “If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy.”

prescribed in California Code of Civil Procedure 1281.12 has resulted in a waiver of his right to proceed in this arbitration against his employer.” A month later, the arbitrator filed a formal award in favor of defendant.

5. Proceedings Resume in the Trial Court

Defendant filed a petition to confirm the arbitration award. Plaintiff filed a petition to vacate the arbitrator’s award and opposition to defendant’s petition to confirm the award. Neither pleading offered any explanation about plaintiff’s failure to abide by his contractual promise to seek timely arbitration of his dispute.

Plaintiff’s petition to vacate urged that the arbitrator’s application of the DRA’s one-year limitation period violated plaintiff’s “unwaivable FEHA rights” because the FEHA gives him two years to file a lawsuit alleging a statutory age discrimination. Similarly, plaintiff claimed that the one-year limitation was substantively unconscionable. Plaintiff also argued that the arbitrator had improperly interpreted and applied the tolling provision in section 1281.12.⁵

Plaintiff’s opposition to defendant’s petition to confirm the arbitration award reiterated all of these points and further argued that the trial court “must use its equitable power to estop Defendant from asserting contradictory representations in court and arbitration in order to prejudice Plaintiff and degrade the integrity of the judicial system.” To support the latter argument, plaintiff relied upon the theories of equitable and judicial estoppel.

The trial court denied defendant’s motion to confirm the arbitration award and granted plaintiff’s motion to vacate the award. The court concluded that the

⁵ In addition, plaintiff claimed that the award had been procured by fraud or other undue means. The trial court rejected this claim.

arbitrator had ruled in excess of his jurisdiction. (§ 1286.2, subd. (a)(4).) The trial court explained that defendant was “estopped to deny the validity of the arbitration forum for determination of plaintiff’s claims on the merits” given that it had successfully compelled arbitration. The court reasoned that by demanding arbitration, defendant had “waived the contractual time limit and must accept the validity of the arbitration forum for a hearing on the merits.” In addition, the trial court held that the arbitrator had miscalculated the tolling period provided by section 1281.12.

The trial court concluded: “In light of plaintiff’s FEHA [age discrimination] claims and the recognition by our Supreme Court [in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83] that such claims are unwaivable statutory rights that must be protected, the arbitrator exceeded his jurisdiction in disposing of the matter by way of summary judgment on a timeliness issue and not affording plaintiff the opportunity to have his claims arbitrated on the merits. The ultimate result of arbitration could not have been predicted by [the trial court] when it referred the matter to arbitration, as the referral was necessarily based on the expectation that because the claims were statutorily protected, they would be arbitrated on the merits. . . . [T]he jurisdictional issue, estoppel, and fundamental fairness due to the nature of plaintiff’s FEHA claims and the protection those claims are provided when submitted to arbitration” require the court to vacate the arbitration award. The court referred the matter back to arbitration for a decision on the merits of plaintiff’s claim.

This petition for writ of mandate by defendant followed. We issued an order to show cause.

DISCUSSION

1. *The One-Year Limitation Period*

We conduct a de novo review of the trial court's determination that the arbitrator exceeded his powers by rendering an award in favor of defendant based on application of the one-year limitation period found in the DRA. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9; *Glassman v. McNab* (2003) 112 Cal.App.4th 1593, 1598.) We conclude that the trial court erred and therefore grant the petition.⁶

For good or ill, “[t]he scope of judicial review of arbitration awards is extremely narrow. Courts may not review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator’s reasoning. [Citations.] Indeed, with limited exceptions, ‘an arbitrator’s decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.’ [Citation.]” (*Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1200.)

Plaintiff concedes the vitality of those principles but urges that another rule governs this case: a trial court “may, indeed must, vacate an arbitrator’s award when it violates a party’s statutory rights or otherwise violates a well-defined public policy.” (*Ibid.*) That rule is based on section 1286.2, subdivision (a)(4), which provides that a trial court shall vacate an arbitration award if it determines that the “arbitrator[] exceeded [his] powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.” An

⁶ Defendant’s petition also advances several procedural arguments as to why the trial court improperly granted plaintiff’s petition to vacate the award. Those arguments are moot given our analysis and disposition of the cause.

award exceeds the arbitrator's powers "where 'according finality to the arbitrator's decision would be incompatible with the protection of a statutory right' or where the award contravenes 'an explicit legislative expression of public policy.'" (*City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 334, quoting from *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 32-33 (*Moncharsh*).

In arguing that the arbitrator's award violated public policy, plaintiff relies (as did the trial court) on his cause of action alleging age discrimination in violation of the FEHA. Under the FEHA, the plaintiff must file an administrative complaint within one year from the date of the discriminatory act. Then, a civil action must be filed within one year from the date the administrative agency issues a "right to sue" letter. (Gov. Code, §§ 12960, subd. (d), 12965, subd. (b).)⁷ Plaintiff urged, and the trial court found, that the arbitrator's application of the one-year limitations period in the DRA contravened public policy because it shortened the FEHA limitations period. We disagree.

The seminal decision is *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83 (*Armendariz*). *Armendariz* considered whether

⁷ Government Code section 12960 provides in relevant part: "(b) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing. . . . [¶] (d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice."

The one-year period within which to file an administrative claim may be extended for reasons not relevant to this case. (Gov. Code, § 12960, subs. (d)(1) – (d)(4).)

Government Code section 12965 provides in relevant part: "(b) If an accusation [in the name of DFEH] is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on his or her request, the right-to-sue notice. *This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice.*" (Italics added.)

a mandatory employment arbitration agreement could be enforced when an employee alleged a cause of action for violation of the FEHA. The opinion first rejected the view that, as a matter of law, an employee could not be compelled to arbitrate a FEHA claim. (*Id.* at pp. 93-99.) Instead, *Armendariz* held that FEHA claims are subject to arbitration, so long as the arbitration agreement contains certain minimum procedural requirements, and is not otherwise procedurally and substantively unconscionable. (*Id.* at pp. 90-91.)

Before addressing the specific claims of unconscionability made about the arbitration agreement in issue, *Armendariz* set forth the governing principle. “[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA. . . . [P]arties agreeing to arbitrate statutory claims must be deemed to ‘consent to abide by the substantive and remedial provisions of the statute [e.g., the FEHA]. . . . Otherwise, a party would not be able to fully “‘vindicate [his] statutory cause of action in the arbitral forum. ’”” (*Id.* at p. 101.) The court also stated that “an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA” (*id.* at p. 101), and that the court’s endorsement of minimum procedural requirements was to ensure that employment-related arbitration agreements “are not used as a means of effectively curtailing an employee’s FEHA rights.” (*Id.* at p. 103, fn. 8.)

Armendariz concluded that the minimum procedural requirements for arbitration of FEHA claims include a neutral arbitrator, adequate discovery, a written decision sufficient to permit limited judicial review, and imposition of arbitration costs on the employer (not the employee). (*Id.* at pp. 103-113.) Because the arbitration agreement in *Armendariz* did not include any limitation period, the court had no reason to discuss what would constitute an unlawful time restriction on an employee’s right to arbitrate a FEHA discrimination claim.

That question was discussed in *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107 (*Martinez*). There, the court reversed the trial court's order granting the employer's petition to compel arbitration, concluding that the arbitration agreement was procedurally and substantively unconscionable. The grounds of substantive unconscionability were that the agreement was impermissibly unilateral in favor of the employer, required the employee to share in the costs of arbitration, and unduly shortened the statute of limitations. As to the shortened limitation period, the arbitration agreement required the employee to notify the employer of all statutory and common law claims within six months of the date the claim arose. Failure to do so forfeited such claims, even if a federal or state statute would have provided a longer period. (*Id.* at p. 112, fn. 2; *id.* at p. 117.)

The court in *Martinez* reasoned: "The statutes upon which Martinez's claims are premised provide significantly longer periods of time than six months within which to assert a claim of violation. Specifically, Martinez's claim of national origin discrimination arises out of the FEHA. That statute provides that Martinez's administrative charge must be filed within one year from the date of the discriminatory act, and that he must file any civil action within one year of the date on which the administrative agency issues a "right to sue" letter. [Citations.] '[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA.' (*Armendariz, supra*, 24 Cal.4th at p. 101.) Similarly, the Labor Code, which provides the bases for Martinez's causes of action for unpaid wages and penalties, affords an employee three or four years to assert the claims sued upon here. [Citations.] If there was any doubt, after *Armendariz*, it is clear that 'parties agreeing to arbitrate statutory claims must be deemed to "consent to abide by the substantive and remedial provisions of the statute. . . . Otherwise, a party would not be able to fully "vindicate [his or her]

statutory cause of action in the arbitral forum.””” (Armendariz, supra, 24 Cal.4th at p. 101, citation omitted.) The shortened limitations period provided by FireMaster’s arbitration agreement is unconscionable and insufficient to protect its employees’ right to vindicate their statutory rights.” (Martinez, supra, 118 Cal.App.4th at pp. 117-118.)

In this case, plaintiff contends (and the trial court concluded) that Armendariz and Martinez, read together, render the one-year limitations provision in the DRA unenforceable. Armendariz, however, did not invalidate arbitral limitation periods shorter than the FEHA period. It did not consider the issue. It did, however, posit the framework by which to evaluate such a limitation period: is the period sufficient to protect a plaintiff’s ability to vindicate a statutory discrimination claim? (See, e.g., Armendariz, supra, 24 Cal.4th at pp. 106-107 [parties may agree to less than full discovery, but the agreed-upon discovery must be “sufficient to adequately arbitrate [the] statutory claim”].)

Further, we do not read Martinez to hold that an arbitral limitation period that is shorter than the FEHA’s is per se unenforceable. Rather, in the context of analyzing whether the entire arbitration agreement as a whole was unenforceable, Martinez concluded that the six-month limitation period was unconscionable as compared to the “significantly longer” period for FEHA claims and the three and four-year statutory periods applicable to the employee’s Labor Code claims. (See also Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal.App.4th 1267, 1283, fn. 12 [court held that 180-day arbitral limitation period, which shortened statutory limitation periods for some of employee’s claims by more than three and a half years, was “one factor” showing that the arbitration contract was substantively unconscionable, but court did “not mean to suggest that this factor, by itself, would compel this conclusion”].)

Martinez is distinguishable based on the severity of the truncated limitation period involved: six months as opposed to one year here. It is also distinguishable based on the procedural posture. In *Martinez*, the question arose in connection with determining whether to order arbitration in the first place, and the court did not evaluate whether, in fact, the six-month period was sufficient to permit the employee to investigate, prepare, and litigate his FEHA and other statutory claims. Here, by contrast, the issue arises after court-ordered arbitration has occurred. In initially opposing arbitration, plaintiff did not contend that the one-year limitation period was unconscionable, and hence the issue was not litigated pre-arbitration as in *Martinez*. Further, as we discuss later in our opinion, the post-arbitration record demonstrates that the one-year period was more than adequate for plaintiff to vindicate his FEHA rights, had he timely submitted to arbitration.⁸

⁸ Although several Ninth Circuit decisions have found a one-year limitations period in an arbitration agreement to be substantively unconscionable, those cases are clearly distinguishable. Each rested its holding on the fact that a one-year time limit potentially deprived the plaintiff of the ability to proceed upon a theory of continuing violations. (*Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1076-1077 [arbitration provision that bars claims not brought within a year of when they were first known or should have been known is substantively unconscionable because it effectively precludes a plaintiff from proceeding on a theory of “continuing violations”]; *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1175 [requirement that an employee initiate arbitration within one year is substantively unconscionable because the employee in a sexual harassment action “foregoes the possibility of relief under the continuing violations doctrine [and] the benefit of this provision flows only to [the employer]”]; and *Circuit City Stores, Inc. v. Adams* (9th Cir. 2002) 279 F.3d 889, 894 [one-year limitations period on initiating arbitration is unconscionable for several reasons, including that it “deprive[s the plaintiff in a sexual harassment lawsuit] of the benefit of the continuing violation doctrine available in FEHA suits”].)

In this lawsuit, it is uncontested that plaintiff’s claim is based upon one discrete act: his discharge on January 31, 2006. Consequently, there is no possibility that he could proceed upon a theory of a continuing violation of statutory rights. As such, the holdings of the federal cases are inapposite.

It is important to remember that FEHA does not have a true two-year limitation period, but rather a hybrid period, the first year of which involves the time within which the employee must exhaust administrative remedies by filing a complaint with the DFEH. (Gov. Code, § 12960, subd. (d).) The DFEH’s practice is “to issue a right-to-sue letter ([Gov. Code,] § 12965) at the employee’s request as a matter of course.” (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 84; see also *Wasti v. Superior Court* (2006) 140 Cal.App.4th 667, 673.) That is, in fact, what happened in this case: after plaintiff was fired on January 31, 2006, he filed his administrative complaint with the DFEH on April 5, 2006, and the letter issued nine days later on April 14. Thus, only two and a half months elapsed from plaintiff’s firing to issuance of the right to sue letter.

Of course, by signing the DRA, the parties in this case explicitly eliminated an administrative proceeding or a lawsuit as a dispute resolution vehicle.⁹ They were permitted to do so, so long as the arbitration agreement did not unreasonably burden plaintiff’s ability to vindicate his statutory rights under the FEHA. Having agreed not to submit employment disputes to administrative review or civil litigation, it was not unreasonable for the parties to also eliminate the maximum one-year statutory period within which plaintiff would otherwise have been required exhaust his administrative remedies. Thus, in context, the DRA’s requirement to commence arbitration within year after the dispute arises is

Finally, we note that in *Soltani v. Western & Southern Life Ins. Co.* (9th Cir. 2001) 258 F.3d 1038, 1042-1045, the court held that a six-month limitation period for a claim of wrongful termination in violation of public policy was enforceable.

⁹ As set forth earlier, the DRA stated that the parties were agreeing to arbitration “[t]o avoid the inconvenience, cost and risk that accompany formal administrative or judicial proceedings.”

comparable to the one-year period within which a plaintiff must file a lawsuit for statutory discrimination after obtaining a right-to-sue letter from the DFEH.¹⁰

Significantly, the record here leaves no doubt that the one-year arbitral limitation period gave plaintiff adequate time to vindicate his FEHA claim in arbitration. After his discharge on January 31, 2006, he obtained counsel within two weeks. He obtained his right to sue letter in April 2006 and filed his lawsuit in October 2006. The entire time frame – firing to lawsuit -- took only eight months. And by the time one-year had elapsed since his termination, the parties had engaged in pleading litigation and discovery. Hence, it cannot be said that the one-year arbitral limitation period provided insufficient time for plaintiff to vindicate his FEHA rights in an arbitral forum. Although plaintiff never explained in the trial court why he had not sought arbitration (see fn. 3, *ante*), his return to our order to show cause implicitly concedes that he knew of his duty to arbitrate, but simply chose not to pursue it. The return states that plaintiff “did not consider demanding arbitration during the ‘one year’ time period following his termination because he believed that [defendant] wanted to litigate the case.”

Finally, we observe that the instant case is unusual. As we have noted, in opposition to the petition to compel arbitration, plaintiff did not contend that the arbitration agreement was unconscionable on any ground. He now asserts that

¹⁰ We note also that the one year arbitral limitation period is also not per se unreasonable as compared to the limitations period for bringing a federal employment discrimination claim under Title VII. The administrative exhaustion requirement under Title VII requires the employee to file an administrative charge with the Equal Employment Opportunity Commission (EEOC) within 180 days after the occurrence of the alleged unlawful employment practice (42 U.S.C § 2000e-5e). The EEOC must issue a right to sue letter at anytime after 180 days has expired (42 U.S.C. § 2000e-5(f)(1)). Then, the employee must file suit *within 90 days* after the right to sue letter is issued. (*Id.* at § 2000e-5(f)(1).)

defendant's "actions . . . prevented [him] from raising an unconscionability argument before the trial court regarding the [DRA's] time limitation provision because he did not believe that the time limitation provision was an issue." But it is not the defendant's burden to apprise the plaintiff of defenses it may raise in arbitration. In any event, defendant's March 2, 2007 letter to plaintiff, sent *before* defendant petitioned to compel arbitration, put plaintiff on notice of that defense. The letter requested dismissal of the lawsuit with prejudice on the basis that the action was barred by the one-year limitations period in the DRA.¹¹ At that point, if plaintiff believed the time limitation provision was unconscionable, it was his burden to raise that matter in the trial court before it ruled on defendant's petition to compel arbitration.

Thus, in this posture, we consider the enforceability of the arbitral limitation period not *before* arbitration has occurred, but *after* it has occurred, and after the arbitrator, as he was authorized to do, determined that submission to arbitration was untimely under the arbitration agreement. (See *Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc.*, *supra*, 41 Cal.App.4th at p. 1178 [whether demand for arbitration is timely under arbitration agreement is for the

¹¹ The March 2, 2007 letter quoted from the applicable provisions of the DRA and then argued: "[Plaintiff] claims that he was made aware that he was terminated from his employment due to his age, on January 31, 2006, the date of his termination. . . . Therefore, it is irrefutable and undeniable that over one year has passed and no binding arbitration has been commenced pursuant to the [DRA]. [¶] In light of the fact that [plaintiff] failed to seek binding arbitration within the necessary and mandatory one year period, [his] claims . . . are VOID and WAIVED." (Capitalization in original.)

arbitrator, not the court].)¹² As we observed at the outset of our discussion, judicial review of an arbitrator's decision is extremely narrow. We cannot review the decision for errors of law and fact, even when the decision causes substantial injustice. Consequently, while we agree with the trial court that the arbitrator misapplied the tolling period provided by section 1281.12 (see fn. 4, *ante*), that decision is insulated from judicial review and is not a proper basis upon which either to deny confirmation of the arbitration award or to vacate the award.

Further, we may conclude that the arbitrator acted in excess of his authority (§ 1286.2, subd. (a)(4)) only if this is the rare case in which “according finality to the arbitrator’s decision would be incompatible with the protection of a statutory right” or where the award contravenes “an explicit legislative expression of public policy.” (*Moncharsh, supra*, 3 Cal.4th at pp. 32-33.) On this record, the arbitrator’s enforcement of the one-year arbitral limitation period did not unfairly burden plaintiff’s opportunity to vindicate his FEHA claim. Despite adequate opportunity to investigate, prepare, and litigate, plaintiff chose to ignore the arbitration requirement and the arbitral limitation period, and never argued that the limitation period was unconscionable when opposing the petition to compel arbitration. In this unusual posture, for the reasons we have stated, we conclude that the trial court erred in finding that the arbitrator, by granting summary

¹² For the first time on appeal, plaintiff contends that the arbitrator was not authorized to interpret and apply the one-year limitation period. Besides having forfeited the claim by failing to raise it in the trial court (*Alternative Systems, Inc. v. Carey* (1998) 67 Cal.App.4th 1034, 1039-1040), we note that in his opposition to defendant’s summary judgment motion in the arbitration proceeding, plaintiff agreed to permit the arbitrator decide the issue. In fact, he correctly cited *Kennedy, supra*, 41 Cal.App.4th 1167, for the proposition that the arbitrator decides whether a demand for arbitration is timely under the terms of the parties’ agreement.

judgment to defendant based on the one-year limitation period, exceeded his powers.

2. *Remaining Contentions*

We now turn to the other arguments advanced by plaintiff to sustain the trial court's order vacating the arbitration award.

Plaintiff contends that the trial court properly vacated the arbitrator's award because the arbitrator exceeded his jurisdiction by finding that the one-year limitations period in the DRA was not substantively unconscionable. We are not persuaded. Plaintiff raised a claim of unconscionability in his opposition to defendant's motion to summary judgment motion. Plaintiff relied upon the holdings in *Armendariz* and *Martinez* to urge that the one-year requirement impermissibly limited his ability to vindicate his FEHA claim. The arbitrator implicitly rejected that claim by granting defendant's summary judgment motion.

To the extent that plaintiff claims the arbitrator's decision was incorrect on the merits, our earlier analysis rejecting the trial court's ruling that the arbitrator had exceeded his jurisdiction applies with equal force. We do not review the arbitrator's decision for errors of law or fact. (*Moncharsh, supra*, 3 Cal.4th at pp. 6, 25-28.)

To the extent that plaintiff urges that the arbitrator exceeded his powers because it was for the court, not the arbitrator, to rule upon unconscionability, we note, first, that plaintiff *invited* the arbitrator to make that decision. Plaintiff cannot now complain about "lack of jurisdiction" merely because the arbitrator made a decision unfavorable to him. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [doctrine of invited error precludes a party from asserting as error conduct which he induced].)

Second, if plaintiff had wished the trial court to rule upon a claim of unconscionability, he should have raised that point in his opposition to defendant's petition to compel arbitration. He did not but, instead, only argued that he had been prejudiced by defendant's delay in seeking to initiate arbitration and that defendant's participation in the lawsuit constituted a waiver of any right to compel arbitration. His failure to raise unconscionability in a timely manner when he had the opportunity to do so constitutes a forfeiture of the claim that the court, not the arbitrator, should have ruled on unconscionability. (See *Alternative Systems, Inc. v. Carey*, *supra*, 67 Cal.App.4th at pp. 1039-1040; *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 129.)

Lastly, plaintiff contends that the trial court properly determined that once the matter was referred to arbitration, defendant was estopped from asserting the one-year limitations period. Although the trial court did not identify a particular theory of estoppel, plaintiff's opposition to the petition to confirm the arbitration award as well as this writ petition advance the theories of equitable estoppel and judicial estoppel. To support application of either theory, plaintiff relies upon the facts that defendant did not raise the issue of arbitration during litigation of plaintiff's lawsuit until after the one-year had expired; that defendant, in seeking to compel arbitration, had urged there was an enforceable arbitration agreement; and that defendant had argued to the trial court (as well as to this court in the first writ proceeding) that plaintiff would not be prejudiced by granting its petition to compel arbitration.

To a large extent, plaintiff used the facts he now relies upon for his estoppel argument to construct the arguments found in his opposition to the summary judgment motion in the arbitration proceeding. Although he did not explicitly raise a theory of estoppel, his return concedes at several points that he "was making an estoppel argument" to the arbitrator to prevent use of the limitations period against

him. In granting summary judgment, the arbitrator implicitly found that these facts did not warrant denial of defendant's motion. Hence, the trial court's reliance upon those very facts to support a finding of estoppel amounts to nothing more than judicial review of the arbitrator's decision, whether characterized as review of its implied factual findings or its legal conclusions. But that is exactly what the trial court cannot do in reviewing the arbitration award. As we have repeatedly noted, it cannot review the arbitrator's decision for errors of fact or law, even if the error causes substantial injustice to a party. (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943-944.) And it cannot vacate an arbitration award unless a statutory ground for vacating the award exists. (*Moncharsh, supra*, 3 Cal.4th at p. 28.) Because the arbitrator had the authority to rule on his estoppel claim, the arbitrator did not exceed his power (§ 1286.2, subd. (a)(4)) in implicitly rejecting plaintiff's estoppel theories.

Moreover, even if a substantive review of the arbitrator's decision were permissible, substantial evidence supports a finding that defendant was not estopped to rely on the one-year limitation period in the arbitration proceeding. Before the petition to compel arbitration was filed, plaintiff was on notice that defendant believed his claim was barred by the one-year period – defendant's March 2, 2007 letter to plaintiff, sent before the petition to compel arbitration was filed, so stated. Thus, substantial evidence supports a finding that plaintiff was not misled into failing to contend in opposition to the petition to compel that the one-year provision was unconscionable.

In conclusion, we understand the trial court's frustration at the result of the arbitration proceeding, especially given plaintiff and defendant's failure to mention the one-year limitation period when litigating the petition to compel arbitration. However, in setting aside the arbitrator's decision, "the trial court did exactly what the Supreme Court in *Moncharsh* said it could not do: review the merits of the

arbitrator's findings concerning the applicable law and the interpretation and enforceability of the [limitations period in the DRA]." (*Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401, 409.)

DISPOSITION

The order to show cause is discharged. Let a peremptory writ of mandate issue compelling respondent court to set aside its orders of January 28, 2008 granting the petition to vacate the arbitration award and denying the petition to confirm the arbitration award and to enter new and different orders granting the petition to confirm and denying the petition to vacate. The parties are to bear their own costs in this original proceeding. (Cal. Rules of Court, rule 8.490 (m)(1)(B).)

CERTIFIED FOR PARTIAL PUBLICATION

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

**LUIS TURCIOS vs. PEARSON DENTAL SUPPLIES, INC., et al.
CASE NO. BC359605/B206740**

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 8383 Wilshire Blvd., Suite 840, Beverly Hills, California 90211.

On September 30, 2008, I served the foregoing document, described as "**REAL PARTY IN INTEREST LUIS TURCIOS' PETITION FOR SUPREME COURT REVIEW**" on all interested parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

*Supreme Court of California Los Angeles Office Ronald Reagan Bldg. 300 South Spring St., Fl. 2 Los Angeles, CA 90013-1233	14 Total: 1 original and 13 copies
Pearson Dental Supplies, Inc., & Pearson Dental Supply Co. represented by: Russell F. Behjatnia, Esq. SBN: 172289 Afzali & Behjatnia, LLP 14401 Gilmore Street, No. 200 Van Nuys, California 91401 Tel: (818) 779-8888	Petitioner: 1 Copy
Clerk of the Court of Appeal California Court of Appeal Second Appellate District 300 South Spring St., Fl. 2, N. Tower Los Angeles, CA 90013-1213	California Court of Appeal: 1 Copy
Superior Court Clerk Los Angeles Superior Court-Central District, 111 N. Hill St. Los Angeles, CA 90012	Respondent/Superior Court: 1 Copy

(BY PRIORITY MAIL) As follows:

I placed such envelope, with postage thereon prepaid, in the United States mail at Los Angeles, California.

I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, at Los Angeles, California, in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation

or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

- (BY ELECTRONIC MAIL)** I sent such document via facsimile mail to the number(s) noted above.
- (STATE)** I declare, under penalty of perjury under the laws of the State of California, that the above is true and correct.
- *(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on September 30, 2008, at Beverly Hills, California.


Jordan D. Bello